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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ZANE M. FLOYD, Plaintiff, v. CHARLES DANIELS, Director, Nevada Department of Corrections; HAROLD WICKHAM, NDOC Deputy Director of Operations; WILLIAM GITTERE, Warden, Ely State Prison; WILLIAM REUBART, Associate Warden at Ely State Prison; DAVID DRUMMOND, Associate Warden at Ely State Prison; IHSAN AZZAM, Chief Medical Officer of the State of Nevada; DR. MICHAEL MINEV, NDOC Director of Medical Care, DR. DAVID GREEN, NDOC Director of Mental Health	Case No. 3:21-cv-00176-RFB-CLB **AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF DUE TO PROPOSED METHOD OF EXECUTION PURSUANT TO 42 U.S.C. § 1983** **(DEATH PENALTY CASE)** **EXECUTION WARRANT SOUGHT BY THE STATE FOR THE WEEK OF JULY 26, 2021**

Care, LINDA FOX, NDOC Director of Pharmacy; JOHN DOES I-XV, NDOC execution team members,

Defendants.

DATED this 1st day of July, 2021.

Respectfully submitted,
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Federal Public Defender

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AMENDED COMPLAINT

1. Plaintiff Zane Michael Floyd, through his counsel, seeks both preliminary and permanent relief, requesting this Court declare and enforce his rights under the United States Constitution and issue an injunction under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments, commanding Defendants not to carry out any lethal injection of Floyd. Nevada's execution protocol and procedures pose an unnecessary risk of causing substantial pain and suffering in violation of Floyd's right to be free from the infliction of cruel and unusual punishment. And Floyd has a procedural due process right to receive an adequate opportunity to litigate his challenge to NDOC's execution protocol before his scheduled execution.

I. INTRODUCTION

2. The State of Nevada, through an April 14, 2021 state court motion for an Order and Warrant of Execution filed by the Office of the Clark County District Attorney, seeks to execute Floyd during the week commencing on the 26th day of July, 2021.[1] The State intends to execute Floyd using a novel, experimental lethal injection procedure. The State's execution protocol sets forth a three-drug or four-drug procedure using fentanyl (or alternatively alfentanil), ketamine, possibly cisatracurium, and potassium chloride (or alternatively potassium acetate), with the drugs to be sequentially injected intravenously into Floyd's body.

[1] In a minute order, dated June 29, 2021, this Court granted Floyd's motions for temporary restraining order, injunctive relief, and for a stay of execution until the week of October 18, 2021. ECF No. 114.

3. Expert evidence establishes that this experimental sequence of lethal injection drugs presents a substantial risk of serious harm to the condemned inmate.[2] Traditionally, multi-drug execution protocols have used as the first drug a barbiturate, such as sodium thiopental or pentobarbital, with the intent of adequately anesthetizing the inmate. The first drug in Nevada's novel protocol, fentanyl (or alfentanil), is not a barbiturate, but an opioid. It has been used only once in an execution[3] in the United States, to execute a volunteer, so the issue was never litigated. Fentanyl is demonstrated to be unreliable, even in high doses, for inducing unawareness. In addition, delivered in bolus doses, fentanyl produces chest wall rigidity.[4] This will likely cause Floyd to experience the distressing sensation of being unable to breathe. Having alfentanil as an alternative to fentanyl only exacerbates the risk of harm as alfentanil is significantly more shorter-acting than fentanyl—i.e., the effect of alfentanil will wear off quicker. The use of fentanyl and alfentanil can also cause vomiting.

4. The second drug in the Nevada protocol is ketamine, a dissociative anesthetic. Nevada would be the first state to ever use the drug ketamine in an

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[2] Counsel for Floyd is currently consulting with experts regarding the effects of the execution protocol and will file his expert notices as required by FRCP 26(a)(2) by July 12, 2021, as stated in the letter to the Court, filed on June 23, 2021. ECF No. 101.

[3] Fentanyl was used in a Nebraska 2018 execution as the second drug of a four-drug protocol, preceded by administration of diazepam. *See* Mitch Smith, Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.,* N.Y. Times, https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html

[4] The State's expert, Dr. Jeffrey Petersohn, agrees fentanyl will cause chest wall rigidity. ECF No. 108-6.

execution. There is a reason that no other governmental entity has used it—it is a dissociative drug with numerous deleterious side effects. In modern medicine it is known as a last resort anesthetic. It is recognized as being structurally similar to phencyclidine (commonly known as PCP or "angel dust"), a street drug that, like ketamine, is abused for its hallucinogenic effects. It is known to produce deleterious side effects, even at significantly lower doses than the protocol provides. As a dissociative drug, the injection of ketamine will cause Floyd to become highly intoxicated and experience hallucinations, delirium, and psychosis, rendering him incompetent to be executed. The drug is further likely to cause excessive oral secretions (salivating), which can lead to choking or result in laryngospasm. Laryngospasm occurs when the vocal cords suddenly close when taking a breath, blocking the flow of air into the lungs, and it is known to be a frightening experience. And ketamine, especially in high doses, causes nausea and vomiting. The risk of choking is increased when the inmate, due to being strapped down on the gurney, is unable to adequately lift his head.

5. Nevada's intended use of a high dose of ketamine as the second drug also constitutes a venture into the unknown, as Nevada's protocol represents the first intended use as the drug as an anesthetic in an execution. But there are some definite risks from using ketamine as an anesthetic agent, for example, the risk that the combination of fentanyl and ketamine in the dosage amounts provided in Nevada's protocol will not reliably induce the necessary depth of anesthesia for the

lethal injection procedure and render Floyd unconscious, unaware, and insensate to pain.

6. The third drug in Nevada's protocol is cisatracurium, a paralytic agent. Cisatracurium paralyzes muscles and risks causing the subject to experience conscious suffocation. Its use creates a risk of harm while providing no medical benefit. Cisatracurium has only been used once before in an execution and was the subject of lethal injection litigation previously in Nevada. The only court to address the lawfulness of Nevada's proposed use of cisatracurium (as the third drug in Nevada's previous three-drug protocol) found it presented an unconstitutional "substantial risk of serious harm" and "an objectively intolerable risk of harm" under the Eighth Amendment.

7. The fourth drug, potassium chloride (or potassium acetate), interferes with the electrical signals that stimulate the contractions of the heart and induces cardiac arrest. It is well established that if the condemned inmate has not first achieved the requisite depth of anesthesia, the inmate will suffer excruciating pain from administration of the potassium chloride. *See Baze v. Rees*, 553 U.S. 35, 53 (2008) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.").

8. In sum, Nevada's novel and experimental protocol creates an undue and substantial risk that the first drug, fentanyl, will cause Floyd to suffer from

chest wall rigidity and the feeling of struggling to breathe. The protocol also creates an undue and substantial risk that Floyd will not be adequately anesthetized and will suffer a horrific death when either the paralytic agent, cisatracurium, or the final drug, potassium chloride, is introduced into his body. The execution protocol presents an unnecessary risk of serious harm and an objectively intolerable risk of harm in violation of the Eighth Amendment. In addition, the execution protocol itself shows that the paralytic is unnecessary, as it requires the use of a paralytic drug in the first formulation, and then alternatively requires no paralytic drug at all. This constitutes an admission that the paralytic agent, which can cause serious anguish, pain, and suffering, presents nothing but an unnecessary risk of harm, as Nevada inmate Scott Dozier's expert anesthesiologist opined back in 2017. As such, this aspect of the protocol presents an arbitrary and capricious imposition of capital punishment in further violation of Floyd's Eighth Amendment rights.

9. Finally, the constitutional problems in Nevada's protocol are further multiplied by several deficiencies in the protocol, including missing components. For instance, there are no requirements that members of the execution team are properly credentialed, trained, and proficient in the tasks assigned (e.g., IV placement) with currency of practice. Moreover, there is inadequate information with respect to the qualifications of the execution team to perform a cut down procedure or to engage in resuscitation. There is no indication in the protocol that members of the execution team undergo background checks to ensure they are appropriate for participation in an execution process. In addition, there are no

safeguards to ensure proper transportation and storage of the drugs to prevent spoliation. Further, the protocol lacks assurances that Floyd will be able to have meaningful or reasonable visit by his attorneys, or be able to access the courts, leading up to, and during, the time of his execution.

10. Thus, Nevada seeks to execute Floyd using a novel, experimental, and arbitrary protocol, unnecessarily risking that Floyd will suffer severe pain during his execution. At the same time, Nevada does not provide adequate access to counsel and the courts before and during the execution. Allowing the State to proceed with the execution of Floyd would subject him to cruel and unusual punishment, in violation of the Eighth Amendment. Allowing the State to proceed with the execution before Floyd has had an opportunity to litigate his constitutional challenge would further violate his procedural due process rights.

II. PARTIES

11. Plaintiff Zane Floyd is a state death row inmate incarcerated at Ely State Prison in Ely, Nevada. Floyd brings this Complaint pursuing legal and any other available remedies to ensure the protection of his physical person and his constitutional rights while under the custody of the State of Nevada, pursuant to 42 U.S.C. § 1983, and the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, seeking declaratory and injunctive relief.

12. Defendant Charles Daniels is the current Director of the Nevada Department of Corrections (NDOC). Daniels is responsible for managing the operations of Nevada's state prison facilities and the custody of the inmates confined therein, including Ely State Prison (ESP). Daniels is ultimately

responsible for the overall operations and policies of NDOC, including overseeing executions pursuant to appropriately authorized state court issued warrants of execution, NRS 176.355, and ensuring those executions are carried out in conformity with the Constitution of the United States. Daniels and all other individuals identified as Defendants in this Complaint are sued in their official capacities.

13. Defendant Harold Wickham is the Deputy Director of Operations at NDOC. Wickham is responsible for overseeing the daily operations of NDOC facilities, including ESP.

14. Defendant William Gittere is the Warden at ESP, and as with the agents and employees at ESP that are under his supervision and control, establishes and implements practices and policies of the prison relating to security, as well as the custody and care of ESP inmates, inclusive of practices and policies for preparing, training staff for, supervising, and conducting executions. Gittere is responsible for ensuring that ESP carries out executions in conformity with the Constitution of the United States.

15. Defendants William Reubart and David Drummond are both Associate Wardens at ESP. Reubart and Drummond share, along with Warden Gittere, in the responsibilities for day-to-day operations of ESP and, in conjunction with the agents and employees at ESP that are under their supervision and control, share in the responsibilities for establishing and implementing practices and policies of the prison relating to security at ESP, as well as the custody and care of ESP inmates,

inclusive of practices and policies for preparing, training staff for, supervising, and conducting executions.

16. Defendant Dr. Ihsan Azzam is the Chief Medical Officer of the State of Nevada. Dr. Azzam is responsible for enforcing all public health laws and regulations in the State. He also has the responsibility of providing consultation to the NDOC Director regarding the selection of the drug or combination of drugs to be used in executions. NRS 176.355. His responsibilities entail certifying that the drugs selected are effective and appropriate.

17. Defendant Dr. Michael Minev is the Director of Medical Care for NDOC and is responsible for the overall delivery of medical services to the inmates in the custody of NDOC. Dr. Minev's responsibilities include oversight of NDOC's Central Pharmacy, which is responsible for dispensing medications to NDOC's inmate population.

18. Defendant Dr. David Green is the Director of Mental Health for NDOC and is responsible for the overall delivery of mental health services to the inmates in the custody of NDOC.

19. Defendant Linda Fox is the Pharmacy Director of NDOC and is responsible for the operations of NDOC's Central Pharmacy and the overall delivery of pharmaceutical services to NDOC's inmate population.

20. Defendants John Does I through XV are unnamed and anonymous execution team members, including, but not limited to, drug administrators, an IV team, and an attending physician, employed by or acting under contract with,

NDOC to consult with, prepare for, participate in, and/or carry out the execution of Floyd. Floyd does not know, and the NDOC Defendants have not revealed, the identities of these Defendants.

III. JURISDICTION

21. Jurisdiction is conferred by 28 U.S.C. § 1331 and § 1343, which provide for original jurisdiction of this Court in suits based respectively on federal questions and authorized by 42 U.S.C. § 1983, which provides a cause of action for the protection of rights, privileges, or immunities secured by the Constitution of the United States. Jurisdiction is further conferred by 28 U.S.C. § 2201 and § 2202, which authorize actions for declaratory and injunctive relief.

IV. VENUE

22. Venue is proper in the District of Nevada under 18 U.S.C. §1391(b)(1)–(3) because the Defendants reside in the territorial jurisdiction of this district, and because a "substantial part of the events or omissions giving rise to the claim[s] occurred," and are continuing to occur, in this district, at ESP in Ely, Nevada.

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES

23. Exhaustion of administrative remedies is not necessary because this action does not challenge prison conditions and because there are no available administrative remedies capable of addressing the violations of federal law challenged in this pleading. Moreover, because the Defendants, particularly Daniels and Gittere, have the discretion to change the Execution Protocol at any time—even after providing notice as to certain aspects—any attempt to grieve would be futile.

VI. FACTUAL BACKGROUND

A. Nevada's September 5, 2017 execution protocol

24. In July 2017, the Eighth Judicial District Court of Nevada issued a warrant scheduling the execution of inmate Scott Dozier. At that time, Nevada's execution protocol was unknown. Counsel from the District Attorney's Office were unable to provide the court with any information about how, and with what drugs, NDOC intended to carry out Dozier's execution. Instead, counsel simply pointed to a radio program, where an NDOC official said that, if an execution warrant was signed, they would be able to obtain the needed drugs.

25. More than a month later, pursuant to litigation in Dozier's state post-conviction case regarding the constitutionality of his planned execution, the State produced a new execution protocol, dated September 5, 2017. The new protocol provided for a novel three-drug lethal injection procedure utilizing the drugs diazepam (a benzodiazepine), fentanyl (an opioid), and cisatracurium (a paralytic).[5]

26. Counsel on behalf of Dozier thereafter retained and consulted with an expert in anesthesiology, Dr. David Waisel, regarding Nevada's new protocol.[6] Dr.

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[5] The three-drug protocol, the nation's first using fentanyl and first to use a paralytic agent as the final, killing drug, was devised by Nevada's former Chief Medical Officer, John DiMuro, D.O. DiMuro interviewed with the Washington Post after resigning from his position, telling the paper he settled on the protocol in a matter of minutes. The December 11, 2017 article quoted him saying, "I honestly could have done it in one minute. It was a very simple, straightforward process." *See* ECF No. 4-1.

[6] Dr. Waisel is a certified anesthesiologist with the American Board of Anesthesiology. Formerly at Boston Children's Hospital and an Associate Professor of Anesthesia at Harvard Medical School, Dr. Waisel is currently the Director of Pediatric Anesthesiology at Yale New Haven Hospital. Dr. Waisel has practiced

Waisel was highly critical of the State's protocol and provided a signed declaration, dated October 4, 2017, to that effect.[7] He opined that the protocol constituted a "sea change" from every other protocol of which he was aware, because the paralytic drug was designed to be the agent of death.[8] Specifically, the third drug, the paralytic cisatracurium, kills by preventing an inmate's ability to breathe, not through drugs that anesthetize (thereby ensuring an unconscious person during the process), but through drugs that paralyze muscles.

27. Premised upon the expert's opinions, counsel for Dozier argued that the protocol and drugs chosen created a substantial risk of causing cruel pain and suffering because its use creates a substantial risk of the condemned inmate being paralyzed and awake while dying of suffocation.[9] "The horror of being awake and unable to move is beyond description," Dr. Waisel observed, citing a known example of a patient undergoing surgery who was aware and paralyzed, who reported she "desperately wanted to scream or even move a finger to signal to the doctors that she was awake."[10] Nevada's 2017 execution protocol, in Dr. Waisel's opinion, was "practically designed to ensure substantial harm of 1) air hunger following the

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anesthesiology for nearly thirty years, consulted on lethal injection protocols, testified approximately ten times in court, and authored almost fifty peer reviewed publications on anesthesiology. ECF No. 4-3 at 2 (declaration of Dr. David B. Waisel, October 4, 2017).

[7] *Id.*

[8] *Id.* at 4.

[9] *See* ECF No. 4-2 at 27 (*State v. Dozier*, District Court of Clark County, Nevada, Case No. C215039, Recorder's Transcript of Evidentiary Hearing of Chief Medical, Nov. 3, 2017).

[10] ECF No. 4-3 at 5.

injections of diazepam and fentanyl and 2) awareness while being paralyzed after the cisatracurium injection."[11]

28. The expert's opinions also included a concern that the dosage amounts provided for the first two drugs (diazepam and fentanyl) were markedly low.[12] In his declaration, Dr. Waisel made specific recommendations to significantly increase the dosages of the first two drugs.[13]

B. Nevada's November 9, 2017 execution protocol

29. After receiving the opinions from Dozier's expert anesthesiologist, the State amended its execution protocol. In October 2017, NDOC informed the state district court it was making changes, including: (1) increasing the loading (starting) dosages for the drugs and clarifying that those loading amounts were never meant to be a cap; (2) instructing that the drugs be "titrated to effect"; (3) conducting "consciousness assessments" to determine how the condemned inmate is responding to the drugs, and if he is still conscious, then gradually increasing the dosages, and repeating the process, until the inmate no longer provides responses to stimuli; and (4) following the administration of fentanyl with a tactile stimulus, described as "some sort of pinch," before the execution team would move on to the paralytic drug.[14] A revised protocol with these changes was adopted and made effective November 9, 2017.

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[11] *Id.*
[12] *Id.* at 17.
[13] *Id.*
[14] ECF No. 4-3 at 6.

30. Although the State decided that these changes were appropriate, the State was unwilling to agree to other changes recommended by Dozier's expert and continued to insist on using a three-drug protocol that employed a paralytic agent as the third and final (lethal) drug.[15]

31. The state district court held an evidentiary hearing concerning the revised protocol on November 3, 2017, where Dr. Waisel testified. The State presented no expert testimony in opposition to Dr. Waisel's testimony.

32. Dr. Waisel testified that the proper administration of 100 mg of diazepam followed by 7,500 mcg of fentanyl would be sufficient, with a high degree of certainty, to kill the condemned inmate by stopping his breathing.[16] He estimated that the time from administration of the drugs to death would be approximately ten minutes.[17]

33. Dr. Waisel further testified that the paralytic drug contained in the protocol was unnecessary to effectuate death because, if the dosages of the first two drugs at the levels stated above were properly administered, the inmate would have already stopped breathing by the time the third drug was administered.[18] On the other hand, if the first two drugs were not properly administered, there is a substantial risk that the use of the paralytic drug will cause cruel pain and

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[15] *See generally id.*
[16] ECF No. 4-2 at 22.
[17] *Id.* at 23.
[18] *Id.*

suffering, as the condemned inmate would still be sentient when the paralytic was administered.[19]

34. Following the evidentiary hearing, the state district court granted an injunction and ordered a stay of the impending execution.[20] The court found that the State's proposed use of a paralytic drug in the execution presented an unconstitutional substantial risk of harm and an objectively intolerable risk of harm in violation of the Eighth Amendment.[21]

35. The State challenged the district court's ruling by petitioning for a writ of mandamus in the Nevada Supreme Court. The Nevada Supreme Court reversed the district court but only on procedural grounds, holding that the lower court abused its discretion in considering the matter because there is no mechanism in post-conviction proceedings for bringing a lethal injection challenge. *Nevada Department of Corrections v. Eighth Judicial Dist. Court*, Nos. 74679, 74722, 2018 WL 2272873, *2 (Nev. May 10, 2018) (unpublished order).

C. Nevada's June 11, 2018 execution protocol

36. In 2018, while the State's petition for writ of mandamus was pending, NDOC altered its November 9, 2017 execution protocol. Because it had run out of its supply of diazepam, the State substituted the drug midazolam (which like diazepam is a benzodiazepine) as the first drug in the protocol. The protocol continued to utilize fentanyl as the second drug, and cisatracurium as the third and final killing

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[19] *Id.*

[20] ECF No. 4-7. NDOC sought a stay of execution from the district court to appeal the injunction order preventing it from using a paralytic agent.

[21] *Id.*

drug. The former Director of NDOC officially signed and adopted this execution protocol on June 11, 2018.[22]

37. Nevada's June 11, 2018 execution protocol presented essentially the same problems presented by the preceding protocol, and like that protocol, was ultimately never used. In September 2018 the State was enjoined from carrying out an execution under the protocol as a result of litigation brought on behalf of manufacturers of the designated drugs.

D. Nevada's current execution protocol

38. In late March 2021, the Clark County District Attorney announced he would be pursuing an execution warrant against Zane Floyd. The execution warrant was sought even though the State lacked the capability of carrying out an execution pursuant to the 2018 lethal injection execution protocol, and had yet to finalize a new protocol.[23] Floyd thereafter filed his Complaint for Injunctive and Declaratory Relief on April 16, 2021, seeking to enjoin Defendants from executing him under the 2018 protocol.[24]

39. Following a number of hearings in this Court, NDOC adopted a new execution protocol dated June 10, 2021.[25] Nevada law contemplates that the lethal injection protocol be devised pursuant to direction or guidance from the State's

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[22] ECF No. 4-5 (Nevada Department of Corrections Execution Manual (2018)).

[23] David Ferrara, *DA to proceed with death penalty against gunman in 1999 store killings*, Las Vegas Review Journal, https://www.reviewjournal.com/crime/courts/da-to-proceed-with-death-penalty-against-gunman-in-1999-store-killings-2315637/.

[24] *See* ECF. No. 2.

[25] ECF No. 93-1; Ex. A.

Chief Medical Officer (currently Defendant Dr. Ihsan Azzam), as the NDOC Director is required by statute to consult with the Chief Medical Officer in selecting the drug or combination of drugs to be used in a lethal injection execution.[26] Consistent with this requirement, it was the previous Chief Medical Officer of Nevada, Dr. John DiMuro, who had developed the lethal injection protocols in September and November of 2017 that were the subject of the Scott Dozier state court lethal injection litigation.[27] Daniels apparently consulted with Azzam on two occasions regarding the drugs in the execution protocol. However, the dosage amounts provided for in NDOC's new protocol was not provided pursuant to the guidance of Dr. Azzam. Rather, it appears from the June 28, 2021 testimony of NDOC Director Daniels regarding his consultation with NDOC's retained expert Daniel Buffington regarding the dosage amounts of the selected drugs, that Nevada's new lethal injection protocol was designed between Director Daniels and Buffington. ECF No. 113 at 39.

40. The new protocol authorizes either a three-drug or a four-drug lethal injection procedure, and provides six different possible drugs from which the procedure is to be comprised, with eight possible combinations. Specifically, the protocol sets forth the following combinations of drugs and alternates: (1) fentanyl or alfentanil, (2) ketamine, (3) cisatracurium, and (4) potassium chloride or potassium acetate.[28] An alternative three-drug protocol repeats the drugs in steps

[26] N.R.S. §176.355(2)(b).
[27] ECF No. 6.
[28] ECF No. 93-1 at 23.

one, two, and four, but omits the paralytic agent cisatracurium.[29] The protocol additionally specifies dosages, concentrations, and preparation instructions, among other subjects.[30]

1. The unconstitutional risks created by the six drugs in Nevada's protocol

41. Each of the six drugs in Nevada's new execution protocol carry demonstrated risks of causing unnecessary pain and suffering.

a. Risks created by Nevada's intended use of either fentanyl or alfentanil

42. Fentanyl is a powerful synthetic opioid. As an opioid, fentanyl has analgesic properties.[31] Fentanyl, however, cannot be relied on to induce unawareness. Fentanyl is not a general anesthetic. Thus, the inclusion of fentanyl in Nevada's novel drug protocol does not alleviate the substantial and unjustified risk that Floyd will be aware while he is being killed, or that he will agonizingly suffocate to death. Neither fentanyl nor alfentanil can reliably obtain a sufficient state where Floyd is unaware of what is happening to him.

43. It is well established that even high doses of fentanyl cannot reliably block awareness. This recognition in the field of anesthesiology dates back thirty-five to forty years, when practitioners utilizing high doses of fentanyl by itself, or with a limited additional agent such as a benzodiazepine, in performing open heart

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[29] *Id.*
[30] *Id.* at 24–28.
[31] ECF No. 4-11 at 27.

surgeries discovered instances of patient awareness during the operation.[32] As a result, doctors stopped the practice of using high-dose fentanyl to achieve anesthetic depth, and other formulas, including fentanyl (in lower dosages) but used in combination with myriad other chemical agents, became the standardized practice.

44. Fentanyl is also known to cause chest wall rigidity, particularly when delivered in bolus doses as under Nevada's protocol. This will likely cause Floyd to experience the distress and anguish of feeling like he is unable to breath.

45. Alfentanil presents the same problems as fentanyl. The principle difference between the drugs is that alfentanil is recognized as being shorter acting, with its desired effect diminishing more rapidly. As a consequence, its use in the context of an execution would, compared to fentanyl, present an even greater risk of harm to Floyd.

b. Risks created by Nevada's intended use of ketamine

46. The intended purpose of ketamine is to, along with the first drug fentanyl, anesthetize the prisoner, rendering him unconscious and insensate to pain and suffering throughout the execution procedure.

47. Ketamine is a last resort anesthetic inappropriate for use in an execution. Under traditional three-drug execution protocols, the initial drug delivered is a barbiturate, such as sodium thiopental or pentobarbital, for the

[32] *See, e.g.*, Jonathan B. Mark & Leslie M. Greenberg, *Intraoperative Awareness and Hypertensive Crisis during High-Dose Fentanyl-Diazepam-Oxygen Anesthesia*, 62 Anesth Analg. 698–700 (1983); Nagaprasadarao Mummanemi, M.D., *Awareness and Recall with High-Dose Fentanyl-Oxygen Anesthesia*, 59 Anesth Analg, 948–49 (1980).

purpose of inducing general anesthesia and rendering the subject unconscious and insensate to pain. Unlike sodium thiopental and pentobarbital, however, ketamine is not a barbiturate. Rather, ketamine is categorized as a dissociative anesthetic.

48. Ketamine is not a typical anesthetic and is not commonly used in clinical practice as a standalone anesthetic. As a dissociative drug similar to PCP, it causes a person to experience hallucinations and often a state of dysphoria. In addition, an individual can still consciously experience one's surroundings and feel severe pain and horrific stimuli, such as that associated with the third or fourth drugs, cisatracurium or potassium chloride (or alternatively potassium acetate), while under sedation using fentanyl plus ketamine. Expert opinion establishes that the administration of fentanyl (or alfentanil) plus ketamine will not produce a flat-line EEG, *i.e.*, will not result in a state of unconsciousness. In short, administration of the first two drugs under Nevada's execution protocol will cause Floyd to be dissociative and incompetent. The State's use of ketamine thus creates a substantial risk that Floyd will suffer harm in violation of his Eighth Amendment rights.

49. Ketamine is also likely to cause excessive oral secretions (salivating), which can lead to choking or result in laryngospasm. Laryngospasm occurs when the vocal cords suddenly close up when taking in a breath, blocking the flow of air into the lungs, and it is known to be a frightening experience. Furthermore, ketamine, especially in high doses, causes nausea and vomiting.

c. Risks created by Nevada's intended use of cisatracurium

50. Nevada's intended use of the third drug, cisatracurium, creates an unnecessary risk of harm to Floyd. Its use presents a substantial and unjustified risk of causing pain and suffering. As Chief Justice Roberts noted in *Baze v. Rees*, "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide [a paralytic] . . . ." 553 U.S. 35, 53 (2008). So too here: should the first two drugs fail to achieve the desired state of unconsciousness, "there is a substantial, constitutionally unacceptable risk of suffocation from the administration of" cisatracurium. *Id.* Under such circumstances, the cisatracurium would cause a freezing of Floyd's muscles, including his diaphragm, causing Floyd to suffer from air hunger and the feeling of suffocation.

51. The Eighth Judicial District Court in Clark County, Nevada, considered the constitutionality of the paralytic agent, cisatracurium, in the context of the Scott Dozier litigation. That court recognized the substantial risk of harm created by use of cisatracurium as the third drug in Nevada's November 2017 protocol. Expert witness Dr. David Waisel, an anesthesiologist from Boston Children's Hospital in Boston, Massachusetts, presented testimony concerning Nevada's execution protocol and opined that the intended use of cisatracurium was unjustifiable. The paralytic third drug, he explained, was unnecessary under the former protocol because, if the dosages of the first two drugs at the levels stated

were properly administered, the inmate would have stopped breathing by the time the paralytic was administered.[33] It was therefore unnecessary to use cisatracurium.[34] On the other hand, the expert explained, if the first two drugs were not properly administered, there was a substantial risk that the paralytic drug would cause cruel pain and suffering, as the inmate would be aware and sensate as he was slowly suffocated to death.[35]

52. The expert thus concluded that the paralytic drug provided no benefit while at the same time creating a substantial risk of pain and suffering.[36] In a medical setting, such a risk would never be taken: "In medicine, every risk we take we want a benefit for. We never take a risk that does not give a benefit."[37]

53. The state court found Waisel's testimony credible and persuasive. Following the evidentiary hearing, the court enjoined NDOC from conducting an execution utilizing its three-drug protocol, specifically finding the State's use of a paralytic drug presented an unconstitutional risk of injury and an objectively intolerable risk of harm, in violation of the Eighth Amendment and the corresponding provision of the Nevada Constitution.[38]

54. Moreover, cisatracurium's superfluousness is reinforced by NDOC's decision to make the drug optional in the final protocol.[39] "[T]he purposeless and

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[33] ECF No. 4-2 at 26.
[34] *Id.* at 27-28.
[35] *Id.*
[36] ECF No. 4-2 at 108-109.
[37] *Id.* at 109.
[38] ECF No. 4-7 at 16.
[39] *See* ECF No. 93-1; Ex. A at 23-28 (EM 103.03).

needless imposition of pain and suffering" is by definition "unconstitutional punishment." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)); *see Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (pronouncing that a "sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *La ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.").

d. Risks presented by Nevada's intended use of potassium chloride or potassium acetate

55. Nevada's protocol calls for potassium chloride (or potassium acetate) to be administered as the last drug in either its three-drug or four-drug method. Both drugs interfere with the electrical signals that stimulate the contractions of the heart and will induce cardiac arrest. It is well recognized, however, that if the personnel carrying out the execution fail to ensure Floyd has first achieved the requisite depth of anesthesia, Floyd will suffer excruciating pain from administration of the potassium chloride. *See Baze*, 553 U.S. at 53 (finding it "uncontested" that, failing a proper dose of the anesthetic, "there is a substantial, constitutionally unacceptable risk of . . . pain from the injection of potassium chloride").

56. The inclusion of potassium acetate as a possible alternative to potassium chloride exacerbates the risks presented to Floyd. Potassium acetate's efficacy for use as part of a lethal injection procedure is virtually unknown. Its use

would make Nevada's already experimental protocol even more experimental.

2. The protocol contains no assurances that state officials will properly store, transport, and administer the execution drugs to decrease the risk of unconstitutional pain and suffering.

57. There is a lack of assurance in Nevada's execution protocol and otherwise no evidence that NDOC will properly transport the lethal injection drugs and store and maintain the drugs safely and at the correct temperature. Indeed, NDOC was found to have mishandled the transportation and storage of the drug cisatracurium, causing the drug to be "compromised," in the *Alvogen* litigation.[40] In addition, there is a lack of assurance that the State will use unexpired drugs. Frequently, drugs do not have a long shelf life following the date of manufacture. Ketamine, for instance, typically has a shelf life of two years.

58. The risk of expiration of some or all of the drugs is not merely speculative. In the *Alvogen* litigation, for example, the drug cisatracurium, which was required to be refrigerated and kept stored between 36 and 46 degrees Fahrenheit, froze, and, according to the manufacturer, had to be used within 21 days or discarded.[41]

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[40] Ex. 21 - Alvogen v. Nevada Dept of Corrections, et al., No. A-18-777312-B (Dist. Ct., Clark County Nev.), Sept. 28, 2018, Findings of Fact and Conclusions of Law at 33.

[41] Ex. 22 - Alvogen v. Nevada Dept of Corrections, et al., No. A-18-777312-B (Dist. Ct., Clark County Nev.), TT 9-13-2018 at 130-35 (Testimony of Anthony Wallace).

3. Risks presented by inadequate provisions for staff training

59. Nevada's execution protocol fails to provide for proper training of execution team members and to ensure minimum qualifications of medical personnel participating in executions, exacerbating the risks presented by Nevada's experimental lethal injection procedure.

60. The lack of adequate provision for training was also the subject of expert testimony in the state court litigation concerning the potential execution of Scott Dozier.[42] The expert anesthesiologist for Dozier, Dr. Waisel, opined that Nevada's protocol failed to adequately set forth the execution staff qualifications and training needed for conducting an execution.

61. As Dr. Waisel testified in state court proceedings on Nevada's execution protocol, ensuring proper training and qualification is crucial:

> The protocol is predicated on an assessment of anesthetic depth. That is whether [the inmate] can respond. That is a skill that comes from training and experience. Without knowing that, it is impossible to assess the risk of an error in this rather—in this assessment, which is actually an art. It's not a black-and-white matter. It's an ability to assess for subtle signs that may indicate that there's a potential for response.[43]

62. In other words, executions require a trained, qualified, properly credentialed medical professional to assess the condemned inmate's level of anesthetic depth. Under Nevada's current protocol, assessment of the anesthetic

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[42] Provision for training in Nevada's 2021 protocol is the same as that provided in the November 2017 protocol about which Dr. Waisel provided testimony.

[43] ECF No. 4-2 at 33.

depth of the inmate prior to administering ketamine, cisatracurium, and the final, killing drug, is achieved by the "attending physician *or* other medical personnel," who must attempt to elicit a response to tactile stimuli—in the form of a "medical grade pinch."[44] Just because an individual does not respond to tactile stimuli, however, does not necessarily mean the person is unaware.[45] Indeed, the expert noted that even a licensed surgeon would not necessarily know when a person was sufficiently unaware to accurately administer the cisatracurium: "this assessment is not something that is part of surgical training, nor is it part of something that they practice on a daily basis or a frequent basis."[46] And Dr. Waisel further testified to being unaware of the term "medical grade pinch" used by Nevada's protocol and being unaware of any objectively ascertainable definition of the term.[47] The ambiguity of this term is exacerbated by the nature of fentanyl (or alftentanil) and ketamine, which interfere with reliable assessments of unawareness.

63. Dr. Waisel ultimately opined that if execution staff's ability to assess anesthesia is limited by inadequate training or lack of experience, an error is more likely to occur. "If they are wrong, in other words, if he's not sufficiently anesthetized and he receives cisatracurium, he is at risk for being aware and paralyzed, which is quite harmful to [the condemned inmate]."[48] In addition, as Dr. Waisel explained, a prison setting is a dramatically unfamiliar situation and

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[44] ECF No. 99-1 at 5–7.
[45] ECF No. 4-2 at 34.
[46] *Id.*
[47] *Id.* at 35.
[48] *Id.* at 36.

location for execution team personnel, which increases the risk of errors.[49] Risks are further increased if staff is inexperienced, and thus high quality practice is "of critical importance."[50] Practice means having a sufficient number of rehearsals prior to the execution to ensure the execution team is prepared and ready. However, having reviewed Nevada's updated execution protocol, Dr. Waisel noted that it failed to provide any assurances regarding the training, practice, and experience of its personnel involved in the execution.[51] He specifically noted the protocol failed to state the amount of experience minimally required for the EMTs responsible for placing the IV lines, and it failed to require the attending physician to have specialized training and sufficient experience assessing and monitoring anesthetic depth.[52] Dr. Waisel opined that the combination of factors presented by the shortcomings in Nevada's execution protocol created a substantial risk of harm:

> In short, having inexpert executioners in an unfamiliar and suboptimal location performing an event they have not done before and have not had sufficient high-quality practice performing, using a novel unproven technique, creates a substantial risk for an error that causes substantial harm.[53]

64. Dr. David Greenblatt, who reviewed Nevada's June 2018 Protocol, shares the same opinion as Dr. Waisel regarding the need for an appropriately trained and qualified medical professional to assess the inmate's level of anesthetic depth:

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[49] ECF No. 4-8 at 9-10.
[50] *Id.* at 10, 12.
[51] *Id.* at 10, 13.
[52] *Id.* at 13
[53] *Id.* at 10.

> [I]t is absolutely necessary that a current, active licensed physician, experienced with anesthesia or emergency medicine, be present during the procedure to, at minimum, direct and oversee the actions or performance of the other execution team members involved in carrying out the execution.[54]

65. Thus, Nevada's execution protocol is insufficient in that it does not provide any assurance that the individual, even if he or she is a physician, is adequately trained and professionally qualified to assess the condemned inmate's anesthetic depth. This flaw in the protocol is exacerbated by the ambiguity regarding the presence of an attending physician—as opposed to some undefined "other medical personnel"—to monitor the anesthetic depth and to perform the verbal and physical stimuli checks.

66. In addition, the current protocol assigns to "Drug Administrators" the responsibility of injecting the drugs.[55] The protocol fails to set forth any minimal qualifications and experience required of the drug administrators, who are two members selected from the Execution "Security Team."[56]

67. Nevada's June 2021 protocol appears to provide for no more execution team training than that provided in the November 2017 and June 2018 protocols, with one exception. Both the June 2018 and June 2021 protocols contain a provision, in EM 110.02.B., stating that prior to the execution the Warden is to receive "practical training" in measuring and reporting the condemned inmate's level of consciousness and monitoring the IV sites for signs of compromise.[57] Even

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[54] ECF No. 4-11 at 28-29.
[55] ECF No. 4-5 at 48.
[56] *See* ECF No. 93-1; Ex A. at 23 (EM 103.03.A).
[57] ECF No. 4-5 at 48; ECF No. 99-1; Ex. A at 4.

with practical training, however, the Warden is not qualified to perform these tasks. Having unqualified personnel carrying out a lethal injection creates undue risk of harm and a botched execution.

4. Risks presented by the execution chamber

68. The execution chamber at Ely State Prison has never been used before.[58] And its design was based on the execution chamber at San Quentin State Prison in California—also never used before and designed almost fifteen years ago. The maintenance and final design of Nevada's chamber is thus untested.

69. In addition, the equipment to be used for the execution, if improperly selected, set up, or maintained, can contribute to unconstitutional pain and suffering. NDOC has not made public this information but Floyd seeks such information through requests for production and a site inspection.

5. Failure to provide right of access to counsel and to the courts

70. Nevada's current execution protocol spells out various procedures and a timeline for the day of the inmate's scheduled execution. Because the protocol only allows for a visit by counsel after the inmate's last meal, after he has been provided with a sedative drug, presumably chlorpromazine, and for an unknown duration of time that may be terminated at the whim of NDOC staff (the "designated warden"),[59] the protocol fails to ensure the condemned inmate adequate access to counsel and to the courts on the day of the scheduled execution. This includes a

[58] Previous executions have occurred at Nevada State Prison in Carson City.
[59] ECF No. 93-1; Ex. A at 55 (EM 109.05.K).

failure to clearly provide such access during the final hour or minutes leading up to, and at the time of, Floyd's execution. And there is no provision dealing with counsel's ability to contact the courts if necessary before or during the execution.

VII. CLAIMS FOR RELIEF

Count I: Proceeding with Floyd's execution under the current protocol violates his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment.

1. Nevada's four-drug or alternatively three-drug execution protocol, utilizing fentanyl (or alfentanil), ketamine, possibly cisatracurium, and potassium chloride (or potassium acetate) violates Floyd's right to be free from infliction of cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

2. Floyd realleges and incorporate herein by reference all of the preceding paragraphs of this Complaint as if set forth in full below.

A. Nevada's execution protocol presents a substantial risk of serious harm.

3. The Eighth Amendment forbids the State, in carrying out a death sentence, from inflicting pain beyond that necessary to end the condemned prisoner's life. *In re Kemmler*, 136 U.S. 436, 447 (1890). "Punishments are cruel when they involve torture or a lingering death . . . something more than the mere extinguishment of life." *Id.*; *see also Baze v. Rees*, 553 U.S. 35, 50 (2008) (explaining an execution violates the Eighth Amendment if it presents a "substantial risk of serious harm"); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019).

1. The drugs in Nevada's execution protocol create an unconstitutional risk of pain and suffering.

4. Nevada's execution protocol presents a substantial risk of serious harm in violation of the Eighth Amendment. The experimental, never-before-used procedure creates a risk of inflicting excruciating pain.

a. Fentanyl or alfentanil

5. Specifically, the first drug to be utilized, fentanyl or alfentanil, does not reliably induce a state of unawareness, even at high doses, and cannot reliably put the condemned inmate in a state of being so deeply sedated as to be unaware. In addition, as a result of the administration of fentanyl or alfentanil, Floyd is sure or very likely to suffer from chest wall rigidity causing him to experience the sensation of being unable to breathe. If alfentanil is chosen, its administration will exacerbate the risk of harm as alfentanil is significantly shorter acting than fentanyl and thus its effect will wear off more quickly. Finally, both fentanyl and alfentanil can interfere with consciousness checks, leading to continuation of the execution despite Floyd's awareness.

b. Ketamine

6. Nevada's use of ketamine, a dissociative anesthetic, as the second drug in its lethal injection procedure contributes to the substantial risk of harm presented by Nevada's experimental protocol. Specifically, because Nevada's first drug, fentanyl, is inadequate for the intended purpose, it is imperative that the second drug reliably induce the requisite depth of anesthesia and render the inmate completely unconscious, unaware, and insensate to pain. Ketamine, however, even in combination with the first drug fentanyl, will not reliably produce a state of

unconsciousness. The drug, similar to the drug phencyclidine (PCP), will cause Floyd to experience a dissociative state of dysphoria. In addition to causing suffering on its own, this state, like fentanyl and alfentanil, will interfere with consciousness checks. The end result is that, following administration of the first two drugs, Floyd will be conscious but in a state of incompetence. Its use in Nevada's protocol creates an undue and substantial risk that Floyd will be aware and will suffer a horrific death when the third drug, cisatracurium, is introduced into his body. Furthermore, its use will render Floyd incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). Under *Ford*, the Eighth Amendment forbids the execution of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

7. Ketamine is also likely to cause excessive oral secretions (salivating), which can lead to choking or result in laryngospasm. Laryngospasm occurs when the vocal cords suddenly close up when taking in a breath, blocking the flow of air into the lungs, and it is known to be a frightening experience. Furthermore, ketamine, especially in high doses, causes nausea and vomiting.

8. Nevada's proposed used of ketamine presents a substantial risk of serious harm to Floyd in violation of his Eighth Amendment rights.

c. Cisatracurium

9. The optional third drug, the paralytic cisatracurium, could cause Floyd to be paralyzed and awake while dying of suffocation. The drug will paralyze Floyd's muscles, including his diaphragm to stop moving. Without proper anesthesia, this will cause him to experience "air hunger" and the feeling of suffocating to death—a

likely outcome given the first two drugs to be administered. Worse yet, there is no need for taking this risk—cisatracurium is unnecessary in the execution process, as the protocol itself demonstrates.

d. Potassium chloride or potassium acetate

10. Injecting Floyd with the fourth and final drug in Nevada's protocol, potassium chloride (or potassium acetate), will cause interference with the electrical signals that stimulate the contractions of Floyd's heart and induce cardiac arrest, resulting in his death. The United States Supreme Court recognizes that if Floyd has not achieved the requisite depth of anesthesia, he will suffer excruciating pain from administration of the potassium chloride. *See Baze* , 553 U.S. at 53 (finding it "uncontested" that, failing a proper dose of the first drug that would render the prisoner unconscious, "there is a substantial, constitutionally unacceptable risk of … pain from the injection of potassium chloride").

11. "[T]he purposeless and needless imposition of pain and suffering" is by definition an "unconstitutional punishment." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (quoting *Enmund v. Florida*, 458 US 782, 798 (1982)); *see Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (pronouncing that a "sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *see also Hope v. Pelzer* , 536 U.S. 730 (2002) (explaining that punishment involving hitching post "amounts to gratuitous infliction of 'wanton and unnecessary' pain" and violates "basic concept underlying the Eighth Amendment [which] is nothing less than the dignity of man"); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)

(explaining punishment is excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"); *La ex rel. Francis v. Resweber*, 329 US 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."). That is precisely the case here. Executing Floyd under the current protocol, despite the existence of less harmful alternatives, would violate his Eighth Amendment right to be free from cruel and unusual punishment.

2. The lack of necessary safeguards in Nevada's protocol increases the substantial risk of harm.

12. On their own, the harm from Nevada's three-drug or four-drug procedure renders any execution unconstitutional. But the substantial risk of harm is heightened even further by the protocol's failure to provide for adequate training and qualifications of staff involved in the execution process, adequate safeguards for transportation and storage of the lethal injection drugs, adequate access to counsel as the execution approaches, and adequate access to the courts.

a. Nevada's execution protocol does not provide for adequate training of members of the execution team.

13. Nevada's protocol continues to fail to provide for sufficient qualification and training of the personnel involved in carrying out the lethal injection procedure. As anesthesiologist Dr. Waisel testified regarding the 2017 execution protocol, the protocol fails to provide for adequate training of execution team members to ensure a lawful execution. The protocol is predicated on an assessment of anesthetic depth—*i.e.*, whether the condemned inmate can respond—which is an art that is derived only from training and experience. It is not a black-and-white matter. It is

an ability to assess for subtle signs that may indicate that there's a potential for response.[60]

14. In other words, the State, in order to properly assess anesthetic depth, must include in the execution team a properly trained, qualified medical professional. But the current protocol lacks that provision, failing to provide any assurances regarding the training, practice, and experience of its personnel involved in the execution.[61] As Dr. Waisel specifically noted, Nevada's protocol fails to state the amount of experience minimally required for the EMTs responsible for placing the IV lines, and it fails to require the attending physician to have specialized training and sufficient experience assessing and monitoring anesthetic depth.[62] The protocol also at times suggests that an attending physician may actually not be present, as it alternatively provides for a "properly trained and qualified medical professional," not a physician. *See*, *e.g.*, ECF No. 99-1, Ex. A at 4 ("Prior to the administration of lethal drugs, an Attending Physician *or properly trained and qualified medical professional* will enter the Execution Chamber Room behind a screen in order to monitor the condemned inmate's level of consciousness during the procedure" (emphasis added)); and ECF No. 99-1, Ex. A at 5 ("Two minutes after injecting the last syringe of either Fentanyl or Alfentanil, the Attending Physician *or other medical personnel* will attempt to elicit an interpretable physical response to a verbal stimulus (*i.e.* move fingers, open eyes) and to a physical stimulus in the

[60] ECF No. 4-2 at 33.
[61] ECF No. 4-8 at 4, 13.
[62] *Id.* at 13.

form of a medical grade pinch." (emphasis added)). This is insufficient for multiple reasons.

15. First, as Dr. Waisel testified in 2017, lack of response to tactile stimuli does not necessarily mean the person is unaware.[63] This risk is increased with fentanyl and ketamine, which can both induce a state that interferes with responses to tactile stimuli, despite awareness.

16. Second, even a licensed surgeon would not necessarily know when a person was sufficiently unaware for purposes of the protocol: "this assessment is not something that is part of surgical training, nor is it part of something that they practice on a daily basis or a frequent basis."[64]

17. Third, Dr. Waisel—a licensed anesthesiologist—testified he was unaware of the term "medical grade pinch," and he further was unaware of any objectively ascertainable definition of the term.[65]

18. Fourth, a prison is a dramatically different location than most medical personnel are used to.[66] Dr. Waisel ultimately opined that if execution staff's ability to assess anesthesia is limited by inadequate training or lack of experience, an error is more likely to occur. "If they are wrong, in other words, if he's not sufficiently anesthetized and he receives cisatracurium, he is at risk for being aware and paralyzed, which is quite harmful to [the condemned inmate]."[67] Dr. Waisel added

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[63] ECF No. 4-2 at 34.
[64] *Id.*
[65] *Id.* at 35.
[66] ECF No. 4-8 at 9-10.
[67] ECF No. 4-2 at 36.

that the combination of factors presented by the shortcomings in Nevada's execution protocol created a substantial risk of harm. In short, having inexpert executioners in an unfamiliar and suboptimal location performing an event they have not done before and have not had sufficient high-quality practice in doing, using a novel unproven technique creates a substantial risk for an error that causes substantial harm.[68]

19. Nevada's current protocol in terms of execution team member qualifications and training appears to be nearly identical to the protocol Dr. Waisel reviewed, with one exception. The current protocol provides that at some unspecified time prior to the execution:

> [T]he Warden will receive practical training in:
>
> 1. Measuring and reporting the condemned inmate's level of consciousness.
>
> 2. Monitoring the IV sites for signs of compromise.[69]

20. The tasks of monitoring and reporting the level of consciousness (anesthetic depth) of the inmate, and monitoring the IV sites for signs of compromise, require trained medical personnel, not the prison warden.[70]

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[68] ECF No. 4-8 at 10.

[69] ECF No. 99-1; Ex. A at 4 (EM 110.02.B).

[70] In the 1950's, the United Kingdom Royal Commission on Capital Punishment conducted a study to evaluate the relative merits of execution by lethal injection versus execution by hanging, and identified several problems that led the members of the commission not to recommend lethal injection as a possible execution method. *Royal Comm'n On Capital Punishment*, 1949–1953, Report 261 (1953) (U.K.). The Royal Commission was particularly concerned about problems associated with individuals with veins that were difficult to access and the need for someone on the execution team to have *complex medical skills*. *Id.* at 257–59.

21. The protocol's provisions governing placement of IV lines and ensuring IV access by properly trained, experienced, and credentialed medical personnel are inadequate and fail to meet minimally acceptable standards. The protocol fails to set forth any minimal training, credentials or qualifications, or currency of practice requirements of the EMTs who will be performing the venipunctures and observing the IV sites. The provisions regarding the possible need to resort to central line access (placing an IV line or catheter in a central vein as opposed to a peripheral vein such as in the arm) are also insufficient. There is reference to alternate sites (other than the condemned inmate's arms) "derived from the advice of the Attending Physician," but the protocol is unclear as to who determines, and how it is determined, whether peripheral vein access cannot be successfully achieved and placement of a central line is needed. The protocol is also unclear as to who would perform the placement of the central line as this is a surgical procedure. Further, it is unknown whether the attending physician (assuming his presence) will have the necessary proficiency and practice with respect to IV placement, venous access, and placing a central line, as many physicians do not have the specific experience required. The protocol is also inconsistent as to whether staff may resort to performing a venous "cut-down" procedure. While EM 110 of the protocol manual does not refer to that possible alternative action, the list of "Needed Medical Equipment and Materials" in EM 104 requires there be "two sterile cut-down trays," indicating that possible resort to a venous cut-down procedure is contemplated.

22. Nevada's protocol is also inadequate with respect to its provisions governing possible resuscitation efforts. *See* discussion, *infra*, at Count II.

b. Nevada's execution protocol does not provide safeguards to ensure adequate and safe transportation and storage of the lethal injection drugs to protect against expiration or spoliation of the drugs.

23. Nevada's protocol fails to provide adequate safeguards to ensure proper transportation and storage of the lethal injection drugs to prevent spoliation or expiration of the drugs. That the Defendants cannot be trusted to provide the necessary safeguards absent such provision in the protocol is demonstrated by the content of the record from the drug manufacturers' litigation in the *Alvogen* case.[71] In that litigation, the unrefuted record established that the NDOC mishandled the transport and storage of the paralytic drug, cisatracurium. Specifically, testimony from witness Anthony Wallace from Sandoz, Inc., established that the drug, as provided in the manufacturer's package insert, was required to be maintained in refrigerated storage between two degrees and eight degrees Celsius, which is thirty-six and forty-six degrees Fahrenheit, to preserve its potency. The drug was also required to be protected from light, and it could not be frozen. Wallace testified that NDOC failed to transport Sandoz's cisatracurium product in compliance with the labelling instructions of the Sandoz product, as well as failed to comply with Healthcare Distribution Management Association (HDMA) guidelines.

[71] *Alvogen v. Nevada Dept of Corrections, et al.*, No. A-18-777312-B (Dist. Ct., Clark County Nev.)

24. Testimony from NDOC pharmacist Linda Fox revealed that the cisatracurium in question was transported from Las Vegas to Ely, Nevada, during a four-hour trip by car in late June, in a Styrofoam cooler with no temperature controls, except for a small block of ice. Fox acknowledged that there was no way to measure what the temperature of the cisatracurium was during that trip or whether the product had ever frozen. The state trial court, in its Findings of Fact and Conclusions of Law, specifically found that there was undisputed testimony regarding the transport and storage of cisatracurium, and that the product had "been compromised."[72]

25. That NDOC might use expired drugs in carrying out Floyd's scheduled execution presents a legitimate concern. In a recent NDOC letter in response to a request for documents regarding NDOC's lethal injection drugs, NDOC stated that it does not keep specific records regarding expiration dates. This disconcerting fact supports the need for NDOC's written protocol to set forth how NDOC will ensure that safe, unexpired drugs will be used in a lethal injection execution.

c. Nevada's execution protocol fails to provide adequate access to counsel and the courts on the day of an execution.

26. Nevada's protocol also fails to provide the condemned inmate with adequate access to counsel and to the courts on the day of his scheduled execution, including during the final hours leading up to, and at the time of, the execution.[73] Without access to counsel and the courts, Floyd will be unable to seek vindication of

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[72] Ex. 21 at 33.

[73] *See* discussion of right to counsel, Count IV.

his constitutional rights at the end of his life, including his right to be free from cruel and unusual punishment during the execution.

27. Specifically, the protocol provides no assurances that Floyd will be able to communicate with his counsel and, through his counsel, the courts, should the proceedings go awry. Nor are there assurances provided in the protocol that Floyd's counsel will have available means to directly communicate with Floyd and with prison officials in the event of a last-minute stay of execution or commutation.

28. These shortcomings of Nevada's execution protocol exacerbate the risk that Floyd will suffer pain or severe harm during his execution.

d. The execution chamber at Ely State Prison compounds the risks presented by the novel drug protocol.

29. In addition to a never-before-used sequence of drugs, Nevada will be executing Floyd in a never-before-used execution chamber, which was designed based on California's never-before-used execution chamber. Moreover, the equipment to be used for the execution has never been used, and it is unclear what NDOC has done to properly select and maintain this equipment. All these factors contribute to the unconstitutional risk of pain and suffering presented by Nevada's protocol.

B. There are feasible, readily implemented alternative methods that would significantly reduce the substantial risk of severe pain.

30. In *Baze*, a plurality of the Supreme Court held that, to establish an Eighth Amendment violation based on a method of execution, an inmate must identify a "feasible, readily implemented" alternative procedure that would

"significantly reduce a substantial risk of severe pain." 553 U.S. at 52.[74] The Supreme Court reiterated this rule two years ago, holding that, to establish an Eighth Amendment violation, "a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (citing *Glossip*, 576 U.S. 863, 868–78 (2015)); *see Baze*, 553 U.S. at 52. "An inmate seeking to identify an alternative method of execution," however, "is not limited to choosing among those presently authorized by a particular State's law." *Bucklew*, 139 S. Ct. at 128.

31. Here, solely for the purposes of this Complaint, and because the Supreme Court has made it a prerequisite to a successful Eighth Amendment method-of-execution challenge, counsel for Floyd identifies the following two methods of execution as feasible and readily implemented alternatives: (1) execution by firing squad; and (2) execution by a one-drug lethal injection procedure using a barbiturate as the single drug. Floyd specifically prefers to be executed by firing squad.

1. Execution by firing squad

32. Execution by firing squad is a feasible alternative method of execution that would significantly reduce the substantial risk of pain from Nevada's current three- or four-drug protocol. *See Bucklew*, 139 S. Ct. at 1125.

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[74] The Supreme Court reaffirmed this test in a majority opinion in *Glossip v. Gross*, 576 U.S. 863 (2015).

a. Execution by firing squad is a feasible alternative.

33. Four states currently authorize execution by firing squad (Mississippi, Oklahoma, South Carolina and Utah). NDOC has the means and ability to join these jurisdictions. NDOC previously had a firing squad protocol and has used a shooting protocol to execute condemned inmate Andriza Mircovich in 1913.

34. For example, Utah executed Ronnie Lee Gardner on June 18, 2010, using a firing squad. And the United States military has used firing squads to execute at least eleven United States military servicemen, including Private Eddie Slovik on January 31, 1945, as well as foreign nationals during times of war. One of those executions, of German Army General Anton Dostler, was officially filmed by the United States Army Signal Corps. That film is now kept as an official United States Government record in the National Archives.[75]

b. Execution by firing squad significantly reduces the substantial risk of pain inherent in Nevada's current protocol.

35. Execution by firing squad eliminates several of the risks inherent in Nevada's current protocol. For example, a firing squad eliminates risks associated with establishing IV access. And a firing squad eliminates concerns with inmates' physical and medical conditions.

36. Execution by firing squad also causes a faster and less painful death than execution by lethal injection. *See Arthur v. Dunn*, 137 S. Ct. 725, 733–34 (2017) (Sotomayor, J., dissenting) (citing reports that a firing squad may cause

[75] *See Anton Dostler*, Wikipedia, https://en.wikipedia.org/wiki/Anton_Dostler.

nearly instantaneous death, be comparatively painless, and have a lower chance of a botched execution); *see also Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (addressing the availability of firing squad as an alternative). And execution by firing squad "is significantly more reliable" than lethal injection. *Glossip v. Gross*, 135 S. Ct. 2726, 2796 (2015) (Sotomayor, J., dissenting). Recent studies have confirmed that execution by firing squad statistically is much less likely to result in "botched" executions than lethal injection.[76] Indeed, since the death penalty was reinstated by the Supreme Court in 1976, the firing squad has been successfully used in three executions, in 1977, 1996, and 2010.[77]

37. Floyd requests that he be executed by the traditional firing squad method, such as that utilized by the State of Utah.[78] The Utah protocol requires selection of an execution team consisting of five to eight peace officers having demonstrated proficiency with weapons under conditions substantially similar to those presented by the execution chamber—*i.e.*, by firing each weapon at a minimum of 21 feet, accurately hitting the target of the same dimension as that which will be attached to the condemned inmate, placed over his heart.[79] Two rounds are to be loaded into each weapon, with measures taken to preclude any

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[76] *See* Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014).

[77] *Utah Reaches Ten Years With No Executions*, Death Penalty Information Center, June 18, 2020, https://deathpenaltyinfo.org/news/utah-reaches-ten-years-with-no-executions#.

[78] Ex. 23 – Utah Department of Corrections Firing Squad Execution Manual, Rev'd June 10, 2010.

[79] *Id.* at 54.

knowledge by the members of the firing squad of who is issued the weapon with two blank cartridges.[80] The inmate is escorted to the execution chamber by a tie-down team and strapped to a chair.[81] The warden is then to direct that an aiming point or target be placed over the condemned inmate's heart, and the warden himself places a hood over the condemned inmate's head.[82] Vital signs of the inmate are checked by a physician no more than three minutes after the first volley has been fired. If vital signs are detected, the physician shall remain beside the condemned and recheck the vital signs every 60 seconds.[83] After a maximum of ten minutes from the first volley, if vital signs of the inmate are still detected, the firing squad is directed to file a second volley.[84]

38. Alternatively, Floyd requests a firing squad method that directs bullets be fired into his brainstem. This method of execution requires use of a .22 Winchester Magnum Rimfire caliber bullet of 40 to 60 grains, fired by 2 to 3 rifles of the .22 WMR rifle class, to ensure that the 2 to 3 bullets fired into the brainstem will have more than sufficient energy to penetrate through to the brainstem. Using these types of ammunition and rifles will ensure that energy from those bullets will dissipate quickly, making it unlikely the bullets will exit the skull on the opposite side. And the relatively lower energy of this combination of bullet and ammunition would be insufficient to cause the explosive expansion of the cranial vault seen with

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[80] *Id.* at 88-89.
[81] *Id.* at 75.
[82] *Id.* at 89.
[83] *Id.* at 90.
[84] *Id.* at 90-91.

high-velocity rifle rounds, while still yielding rapid destruction of the key components of the central nervous system at the brainstem.

39. Additionally, by targeting the brainstem, Floyd's death would be extremely rapid. The bullets would transect the brainstem milliseconds after reaching the external surface of the head, faster than neural transmissions from the sensory nerves could communicate that event to the conscious brain, and faster than the speed of sound. Thus, Floyd would neither hear the reports of the rifles nor feel the impact of the bullets before the bullets hit his brainstem. Thus, while not truly instantaneous, such a mechanism would be instantaneous for all practical purposes, causing instant and catastrophic damage to Floyd's brainstem, along with irreversible loss of consciousness, awareness, and sensation, and followed almost immediately by death.

2. Lethal injection by one-drug protocol

40. A second method of execution is also feasible—execution using a single drug barbiturate, *e.g.*, pentobarbital or sodium pentothal (thiopental). This method, like the firing squad, would significantly reduce the substantial risk of pain inherent in Nevada's current protocol.

41. Unlike fentanyl or ketamine, pentobarbital is a barbiturate that acts as a sedative hypnotic drug. Barbiturates do not have a ceiling effect. And a barbiturate like pentobarbital reliably induces and maintains a coma-like state that renders a person insensate to pain. Thus, when properly administered, barbiturates eliminate the risk that a prisoner will feel the administration of other lethal drugs.

a. The one-drug alternative is feasible.

42. At least nine states—Arizona, Georgia, Idaho, Louisiana, Missouri, Ohio, North Carolina, South Dakota, and Texas—authorize a single-drug pentobarbital protocol as a method of execution.[85] And, according to former United States Attorney General William Barr, pentobarbital is "widely available."[86] Indeed, several jurisdictions, including Texas and the federal government, have recently used pentobarbital in carrying out executions. Recently, Arizona announced that it had obtained pentobarbital to use in executions.[87]

43. The Supreme Court has also suggested a similar procedure was constitutional (using pentobarbital as the anesthetic and killing agent). In a decision denying an application for a stay of execution, the Court explained pentobarbital "'is widely conceded to be able to render a person fully insensate' and 'does not carry the risks' of pain that some have associated with other lethal injection protocols." *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (*per curiam*) (quoting

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[85] Arizona provides three possible methods: a single-drug pentobarbital injection procedure; a single drug sodium thiopental injection procedure; or execution by lethal gas. Louisiana uses a single-drug pentobarbital procedure as one of two possible lethal injection methods. Though it has not been used, Ohio's current protocol also authorizes a one-drug pentobarbital protocol as an alternative method of execution. *See In Re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, Slip Copy 2021 WL 325884 at *10, n.10 (S.D. Oh. Feb. 1, 2021)

[86] Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, N.Y. Times, https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html.

[87] *Arizona finds pharmacist to prepare lethal injections*, Assoc. Press, https://ktar.com/story/3656264/arizona-finds-pharmacist-to-prepare-lethal-injections/; Jeremy Duda, *Arizona finds pharmacist willing to supply execution drugs*, Tucson Sentinel, http://www.tucsonsentinel.com/local/report/102820_pharma_executions/arizona-finds-pharmacist-willing-supply-execution-drugs.

Zagorski v. Parker, 139 S. Ct. 11 (2018) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari)). The Court further observed that single-dose pentobarbital protocols had become "a mainstay of state executions," and additionally noted that pentobarbital:

> Has been adopted by five of the small number of States that currently implement the death penalty.
>
> Has been used to carry out over 100 executions, without incident.
>
> Has been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions.
>
> Was upheld by this Court last year, as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter.
>
> Has been upheld by numerous Courts of Appeals against Eighth Amendment challenges similar to the one presented here.

Id. (internal citation omitted).

b. The one-drug alternative significantly reduces the substantial risk of pain inherent in Nevada's current protocol.

44. Using a barbiturate instead of potassium chloride as the killing agent would minimize pain and suffering. The trend among the death penalty states is to simplify protocols by utilizing a barbiturate as the anesthetic and fatal drug, and this aligns with concerns for humanity and for minimizing pain and suffering—a fact recognized by the veterinary community for decades in its proscription of

paralytics in animal euthanasia.[88] If there is a mistake during administration, the medication can simply be readministered without causing the torturous pain and suffering caused by the use of a paralytic and potassium chloride or potassium acetate.

45. The trend has been to utilize a single-drug protocol. Floyd's proposed one-drug alternative aligns with that trend. As a feasible alternative, execution by a one-drug barbiturate procedure utilizing compounded pentobarbital or sodium pentothal (thiopental) that complies with all state and federal compounding requirements, and has been tested for purity and potency, with records of testing, chain of custody, and compounding formula disclosed to prisoners and their counsel, presents another feasible method of execution that—along with implementation of necessary measures and safeguards to assure a lawful and humane execution that complies with the guarantees afforded to all citizens including Floyd under the Eighth Amendment—is available to Nevada and NDOC.

Count II: Proceeding with Floyd's execution under the current protocol violates his Eighth and Fourteenth Amendment rights to medical care and to be free from serious harm.

1. Floyd realleges and incorporates herein by reference all the preceding paragraphs of this Complaint as if set forth in full below.

[88] It is well established throughout the veterinary community—including in Nevada—that a single-drug protocol using a barbiturate is the only humane method for animal euthanasia. American Veterinary Medical Association, *AVMA Guidelines for the Euthanasia of Animals*, at 43–44, 49, 102 (2013); *see also* Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 Ford. Urb. L. J. 817, 834-35, 841–42 (2008); Nev. Rev. Stat. § 638.005.

2. The Eighth Amendment forbids "deliberate indifference" to "serious medical needs of prisoners," *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and to a substantial risk of serious harm to a prisoner, *see Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

3. The choice of a course of medical treatment may violate the Eighth Amendment where it is "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir. 1974), *vacated and remanded on other grounds sub nom. Cannon v. Thomas*, 419 U.S. 813 (1974).

4. Defendants are required to provide Floyd with appropriate medical care until the moment of his death. Thus, the Eighth Amendment's proscription against deliberate indifference requires that NDOC administer the death penalty without the "unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 173.

5. The current execution protocol constitutes deliberate indifference to a substantial risk of serious harm to Floyd. Floyd has alleged several feasible and readily implemented alternatives to the execution protocol that would substantially reduce the risk of substantial harm.

6. Nevada's protocol, in addition to the novel and experimental lethal injection method, reflects deliberate indifference to a substantial risk of serious harm with respect to the possible need to resuscitate Floyd if at any point the execution is stopped. The protocol's provisions for this contingency are

disconcertingly inadequate.[89] The provisions fail to set forth: how the decision to stop the execution is made; who is or are the individual(s) responsible for making the decision; and what are the qualifications, background and training of these individuals. Should an effort to resuscitate Floyd become warranted, that effort needs to be made by an appropriately qualified medical professional. The protocol's reference to the "Attending Physician" is insufficient because, as stated previously, it is not at all clear under the protocol whether an attending physician will actually be present at the execution and, if so, whether the physician will be in the execution chamber and, if so, what are the physician's credentials and qualifications. The protocol's vague reference to "medical personnel"[90] is likewise insufficient as the protocol provides no minimum qualifications or training requirements for them. The protocol also makes reference to equipment to be made available in case resuscitation attempts are required, but cites to a lengthy "List of Needed Equipment, Materials and External/Internal Contacts" set forth in the protocol,[91] at EM 104.01, without the specifying equipment to be used in a resuscitation effort.

7. NDOC's execution protocol violates rights secured and guaranteed to Floyd by the Eighth, and Fourteenth Amendments of the United States Constitution.

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[89] *See* ECF No. 99-1; Ex. A at 3 (EM 110.02D.1).
[90] *Id.*
[91] *See* ECF No. 93-1 at 29 (EM 104.01).

Count III: Proceeding with Floyd's execution violates his right to due process under the Fourteenth Amendment.

1. Floyd realleges and incorporates herein by reference all the preceding paragraphs of the instant Complaint as if set forth in full below.

2. The Due Process Clause of the Fourteenth Amendment entitles Floyd to notice and an opportunity to be heard before being deprived of life, liberty, or property.

3. Being "deprived of life" unequivocally implicates a constitutionally protected interest under the Fourteenth Amendment, and the United States Supreme Court has held that constitutionally protected "liberty interests are implicated" when the government plans to "inflict[] appreciable physical pain." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

4. NDOC's execution protocol is ambiguous as it provides for not only a three-drug procedure and a four-drug procedure, but also allows for different combinations within those procedures by authorizing six different possible drugs: fentanyl, alfentanil, ketamine, cisatracurium, potassium chloride, and potassium acetate. The four-drug procedure involves the use of a paralytic agent, while the three-drug procedure does not. The inconsistency with respect to the need for a paralytic agent is unexplained. The use of the three-drug protocol versus the four-drug protocol is at the discretion of the Director.

5. Because the protocol allows for use of six different drugs, the NDOC has submitted, in actuality, an execution manual that lists 8 different lethal injection protocols. The possible sequences under the 4-drug method:

1. Fentanyl – Ketamine – Cisatracurium – Potassium chloride

2. Alfentanil – Ketamine – Cisatracurium – Potassium chloride

3. Fentanyl – Ketamine – Cisatracurium – Potassium acetate

4. Alfentanil – Ketamine – Cisatracurium – Potassium acetate

And the possible sequences under the 3-drug method:

5. Fentanyl – Ketamine – Potassium chloride

6. Alfentanil – Ketamine – Potassium chloride

7. Fentanyl – Ketamine – Potassium acetate

8. Alfentanil – Ketamine – Potassium acetate

6. All of these eight possibilities employ either one or two drugs, ketamine and alfentanil, never used previously for lethal injection by any State. Further, potassium acetate has been intentionally used by only one state (Florida)[92] in executions, and thus its efficacy for use under Nevada's protocol is unknown. And fentanyl has only been used once, to execute a volunteer in Nebraska. These eight new lethal injection protocols are given without any reasons for their drug choices nor descriptions of the purpose for what each drug is used. They are all presented with no ranking as to which protocol might be the most effective and humane manner of execution. The statement that the choices of first drugs and last drugs will be determined "depending on availability" suggests that the NDOC will use whatever is on hand without regard to differences in the drugs themselves.

[92] Potassium acetate was also used once in an execution by Oklahoma, but its use was in error and only discovered post-execution.

7. The State's protocol allows for so many possibilities, without any science or medicine-based direction as to which option is to be chosen, that it fails to provide adequate information with sufficient clarity to Floyd to constitute meaningful notice of its intended plan for carrying out his execution.[93] The protocol thwarts Floyd's ability to present a concise challenge, and leaves Floyd guessing as to what drugs will be used and why they will be chosen.

8. Moreover, procedural due process principles require that Floyd be afforded an adequate opportunity to litigate the State's experimental protocol. Due process principles require both notice and the opportunity to be heard. Fundamental fairness is inextricably intertwined with Floyd's ability to vindicate his Eighth Amendment rights. The State has disclosed an execution protocol as described above that constitutes eight different potential permutations, consisting of drugs that have never been previously used in an any lethal injection protocols. The protocol was first disclosed on the evening of June 9, 2021. Floyd deserves

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[93] The Ninth Circuit recently rejected a similar, but substantially different, due process claim in *Pizzuto v. Tewalt*, 997 F.3d 893 (9th Cir. 2021). *Pizzuto* concerned Idaho's lethal injection protocol which provided for one-drug or three-drug alternative methods, with each method permitting substitution of pentobarbital for sodium thiopental. *Pizzuto* is clearly distinguishable. First, all of the drugs to be used under Idaho's protocol have been used in executions before—none of the drugs are untried, untested, or experimental for purposes of an execution. The same cannot be said of the drugs listed in Nevada's protocol. Second, Idaho's protocol allowed for four different possible methods of lethal injection, not eight like Nevada's. Third, two of Idaho's four methods are a single-drug barbiturate procedure, which is the least controversial of the lethal injection procedures and constitutes the alternative method of execution proposed by Floyd. And all of the protocols in Idaho begin with a well-established barbiturate medication.

adequate time to investigate the medical significance of eight protocols. Floyd's ability to meaningfully litigate against each of the State's permutations implicates his opportunity to be heard with respect to the Eighth Amendment challenges pleaded in this amended complaint. Floyd's procedural due process rights encompass his ability to meaningfully litigate against the State's execution protocol.

9. For these reasons, executing Floyd pursuant to Nevada's June 10, 2021 execution protocol would violate Floyd's due process rights under the Fourteenth Amendment.

Count IV: Proceeding with Floyd's execution under Nevada's novel and untested protocol constitutes biological experimentation of a captive human subject in violation of federal law and the Eighth Amendment.

1. Floyd realleges and incorporates herein by reference all the preceding paragraphs of the instant amended complaint as if set forth in full below.

2. By attempting to conduct executions with an ever-changing array of untried drugs of unknown provenance, using untested procedures, Defendants are engaging in a program of biological experimentation on a captive and unwilling human subject.

3. There is a real and immediate threat that Defendants will continue their program of human experimentation as they attempt to execute Floyd.

4. Defendants are conducting the biological experimentation without any scientifically sound expectation that these experiments will succeed in producing an execution that does not inflict severe pain, needless suffering, or a lingering death.

5. Defendants lack the scientific skills needed to design an execution procedure that does not inflict severe pain, needless suffering, or a lingering death. Moreover, Defendants have designed the current execution procedure without adequate consultation with appropriate experts having those skills. Human experiments designed without the benefit of these skills have no reasonable prospect of success.

6. Defendants have failed to test their lethal drugs and execution procedures on non-human animals before using them on a captive and unwilling human subject. Without the benefit of animal-testing results, Defendants have no reasonable justification for conducting high-risk experimentation with lethal drugs on Floyd.

7. In engaging in human experimentation through the new execution protocol, Defendants are acting in violation of federal regulations that afford protection and ensure minimal risk to the human subjects of clinical investigation.[94] The Food and Drug Administration (FDA) has comprehensive authority over the

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[94] *See* 45 C.F.R. § 46.101 *et seq.* (HHS Policy for Protection of Human Research Subjects); 21 C.F.R. § 50 (2014); 28 C.F.R. § 512.10 (2014) (governing research involving human subjects conducted by the Federal Bureau of Prisons); *see also* Seema K. Shah, *Experimental Execution*, 90 Wash. L. Rev. 147, 147–48 (2015); Johns Hopkins Clinic for Pub. Health Law & Policy, *State Departments of Corrections are Violating FDA's Investigational New Drug Regulations by Experimenting with Lethal Injection Drugs* (2014), available at http://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publics-health/Lethal%20Injection%C20Policy%C20Paper%20Final.pdf; Leonard G. Koniaris et al ., *Ethical Implications of Modifying Lethal Injection Protocols*, 5 PLOS MED. 845 (2008); Seema K. Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101 (2008).

investigational use of drugs.[95] Nevada's new proposed four-drug and three-drug lethal injection procedures constitute an investigational use of drugs. FDA regulations require the submission to FDA of an 'Investigational New Drug' application (IND) when a "clinical investigation"[96] of drugs is undertaken. Thus, under the FDA's regulations governing investigational new drugs, the NDOC is required to submit its execution protocol with new lethal injection drug procedures to the FDA before using those protocols to execute Floyd. Further, regulations promulgated by the Department of Health and Human Services provide that research on prisoners should not take place unless the research is likely to have some benefit for prisoners as a group or for individual prisoners enrolled in the research.[97] The Defendants and NDOC are in violation of these federal regulatory requirement. These federal regulations preempt Nevada's execution protocol. *See, e.g., Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (federal preemption takes place when it is "impossible for a private party to comply with both state and federal requirements." (quoting *Mutual Pharmaceutical Co. v. Bartlett*, 570 U. S. 472, 480 (2013)). In addition, Floyd has a due process right to be assured that Defendants and NDOC comply with federal investigational new drug

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[95] Note, *Regulation of Investigational New Drugs: "Giant Step for the Sick and Dying"*?, 77 Geo. L. J. 463, 469 & n. 47 (1988) (citing legislative history of 1962 Drug Amendments).

[96] The FDA has defined "clinical investigation" to mean "any experiment in which a drug is administered or dispensed to, or used involving, one or more human subjects," and it further defines 'experiment' in this context to mean "any use of a drug except for the use of a marketed drug in the course of medical practice." 21 C.F.R. § 312.3(b).

[97] *See* 45 C.F.R. § 46 subpart C (2014).

regulations with respect to the method and choice of drugs to be used in his execution.

8. There is a substantial risk that Defendants will continue their unsound and defective experimentation as they attempt to execute Floyd, and that this experimentation will cause Floyd to experience severe pain, needless suffering, and a lingering death.

9. In conducting biological experimentation on a captive and unwilling human subject, Defendants have acted and will act with deliberate indifference to the risks identified above.

10. If the attempted execution of Floyd is allowed to proceed, Floyd will be subjected to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Count V: Proceeding with Floyd's execution under the current protocol violates his First, Sixth, and Fourteenth Amendment rights of access to courts and counsel, and to meaningfully litigate claims.

1. Floyd realleges and incorporates herein by reference all the preceding paragraphs of the instant amended complaint as if set forth in full below.

2. The current execution protocol fails to ensure adequate visitation of the condemned inmate by his counsel, at and around the time of the scheduled execution, including the day of execution. Execution Manual (EM) 109 is entitled "Execution Process Timeline," and it contains various provisions pertinent to the execution covering the last 30 days, the last 2 weeks, the last week, the last 48 hours, and the last 24 hours prior to the execution. EM 109.05.01–05. The only

mention of visitation by the inmate's counsel in the entire 30-day timeline is in EM 109.05.K., which allows the condemned inmate to receive a visit on the day of execution from "one (1) attorney of record" for an indeterminate duration. Specifically, it allows for this visit by an attorney of record to take place following completion of the inmate's last meal "until a time as determined by the designated Warden." This provision for a single visit by one counsel of record is problematic for several reasons.

3. First, the protocol fails to ensure that attorney-client visits shall be permitted during the 29 days leading up to the day of execution, a time period during which frequent visits with the client will be necessary.

4. Second, the protocol fails to provide for visitation by counsel with the client for the vast majority of the client's final day. Because the visit is not permitted until after the condemned inmate has had his three meals for the day, including his last meal (dinner), there will be little time remaining for counsel's last visit with the client—to discuss any and all outstanding legal matters, last minute issues, and for saying final good-byes—before he is executed. Due to redactions, the protocol leaves it unknown as to how much time exists between the inmate's final meal and when he is escorted to the execution chamber.[98]

[98] The protocol provides for family members and the spiritual advisor or Institutional Chaplain to visit with Floyd during earlier hours on the day of his execution, but not Floyd's counsel. *See* ECF No. 93-1 at 54-55 (EM 109.05 (D and E)). The only other reference to Floyd's counsel regarding the day of execution is at EM 109.05.C, which authorizes Floyd to send out a letter or make a final telephone call to his attorney-of-record.

5. Third, under the current protocol, the one visit that is provided for between counsel and his condemned client may be terminated at any time at the whim of the designated warden. Thus, there is no assurance of any meaningful visit.

6. Fourth, under the protocol, the single visit that is provided for between counsel and his condemned client does not occur until after the client has already been offered and presumably taken his first of two pre-execution sedatives. It is likely that NDOC intends to administer chlorpromazine to Floyd as a pre-execution sedative. Chlorpromazine is an anti-psychotic medication. Giving that medication to someone like Floyd who is not psychotic risks preventing him from adequately communicating with counsel. Thus, counsel may be left with no opportunity to visit with his client on the day of his execution while the client is alert, thinking clearly, and communicating rationally. There exists no justification for not allowing the condemned inmate's counsel continued access to his client throughout the day of his execution.

7. Nevada's protocol also is unclear regarding Floyd's access to the courts during the final few hours and minutes before his scheduled execution. More specifically, the protocol is unclear as to Floyd's counsel's access to a phone or means by which to communicate directly and immediately with the federal or state courts or other governmental officials at and around the time of his execution. The protocol, at EM 109.02.B.11, provides that an unidentified individual is to ensure that execution area phones "operate so that internal and external phone calls may

be placed and received," and includes the condemned inmate's attorneys of record in a lengthy list that follows, indicating counsel will have access to the execution area phone lines. However, due to redactions in the protocol, the meaning of this provision is unclear. There are five lines of redacted content immediately preceding the lengthy list of offices and official titles such that it cannot be known what the list actually signifies. Also, the provision as it relates to Floyd's counsel is further unclear as it identifies, at 109.02.B.11, "The Condemned Inmate's Attorneys of Record as noted . . . [portion redacted]." Without knowing what the protocol states after the words "as noted," Floyd's counsel cannot be certain that he is assured adequate access to the courts.

8. Further, the protocol lacks assurances that at the onset of and during the execution process, Floyd's counsel will be able to communicate directly to prison officials in the death chamber or adjacent equipment room who are responsible for carrying out the execution. Counsel must have this capability to ensure his client's constitutional rights are protected throughout the process of his execution.

9. Floyd has a constitutional right of access to the courts that is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Meaningful access means that inmates must have the opportunity to "communicate privately with an attorney." *See Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995) (invalidating prison policy preventing contact visits between inmates and attorneys); *see also DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) ("A prison inmate's right of access to the

courts is the most fundamental right he or she holds. 'All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.'" (quoting *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973)).

10. A prison regulation impinging on an inmate's constitutional rights is only "valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). In evaluating a claim of denial of meaningful access to the courts, a court must "weigh[] the interests of the prison as an institution (in such matters as security and effective operation) with the constitutional rights retained by the inmates." *Cooey v. Strickland*, 2011 WL 320166, at *9 (S.D. Ohio Jan. 28, 2011) (internal citation and quotation omitted).

11. The Sixth Amendment right to counsel, as well as the Due Process Clause, demands that if circumstances arise immediately prior to, or during, a prisoner's execution that present constitutional concerns, the prisoner has the means—through counsel—to petition the courts for appropriate relief. *Cooey,* 2011 WL 320166, at *10 ("If Plaintiffs cannot communicate with counsel [on the day of execution], then this Court can hardly conclude as a matter of law that Plaintiffs have adequate, effective, and meaningful access to the courts."). Condemned prisoners are thus constitutionally entitled to in-person visitation with their attorneys at this critical time. *See also Ching*, 895 F.2d at 610 (holding that a prisoner must be permitted attorney visitation absent justification from prison); *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1207–08 (7th Cir. 1983) (prison's

restrictive telephone policy unconstitutional); *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995); *Cooey*, 2011 WL 320166, at *9 (execution protocol that limited attorney contact on the morning of an execution was unconstitutional).

12. The Supreme Court has made clear that the right of access to courts under the First Amendment is implicated where the state "hinder[s]" a prisoner's "efforts to pursue a legal claim." *Casey v. Lewis*, 518 U.S. 343, 351 (1996); *see also First Amendment Coalition of Arizona, Inc. v. Ryan*, 938 F.3d 1069, 1083 (9th Cir. 2019) (Berzon, J., concurring in part and dissenting in part). In her partial concurrence in *First Amendment Coalition of Arizona, Inc.*, Judge Berzon observed that execution procedures depriving a condemned inmate of "the opportunity to be heard at a meaningful time and in a meaningful manner" would constitute a procedural due process violation. 938 F.3d at 1085 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Judge Berzon added that execution procedures that render inmates unable to litigate meaningfully their liberty interest in avoiding an unconstitutionally painful execution would be sufficient to violate procedural due process principles. *Id.* (citing *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003)).

13. Nevada's execution protocol denies or places impermissible restrictions on Floyd's right—particularly on the day of, and at the time of, his execution—to confidential communication with his counsel, and impermissibly restricts his counsel's ability to access the courts (thereby denying Floyd's right to access the courts and/or his right to petition the applicable authorities to seek redress of his

grievances), in violation of Floyd's rights under the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Count VI: The Use of Ketamine under Nevada's Lethal Injection Execution Protocol Will Produce Psychosis and Render Floyd Incompetent to be Executed Pursuant to *Ford v. Wainwright*.

1. Ketamine is derived from phencyclidine (PCP). The injection of ketamine under Nevada's execution protocol will cause Floyd to become highly intoxicated and to experience hallucinations, delusional thinking, and psychotic ideations. As a result, Floyd will no longer have a rational understanding of what is happening to him or why it is happening, rendering him incompetent to be executed.

2. Nevada's execution protocol also contemplates providing Floyd with two doses of an unspecified pre-execution sedative, likely chlorpromazine, the first dose being offered at approximately four hours and the second dose approximately one hour prior to the execution.[99] Chlorpromazine is an anti-psychotic medication. Giving it to someone like Floyd who is not actively psychotic may cause him to be rendered incompetent to execute 1 to 4 hours prior to the scheduled execution.

3. In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that "[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane," which was defined as a person whose mental condition "prevents him from comprehending the reasons for the penalty or its implications." 477 U.S. at 410, 417. The Supreme Court further explained in *Panetti*

[99] EM 109.05(H)(1).

v. Quarterman, 551 U.S. 930 (2007), that the Eighth Amendment prohibits the execution of a person who lacks a "rational understanding" of "the State's rationale for [his] execution." *Id.* at 958-59. The Supreme Court recently reiterated that the inquiry under *Ford* is concerned not with the particular disorder of the inmate but with the "particular effect," stating that the *Ford* standard "has no interest in establishing any precise cause." *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019).

4. A Ford claim becomes ripe when an execution is imminent. Here, because the State has issued a warrant for Floyd's execution and the execution is currently scheduled for the week of July 26, 2021, Floyd's presentation of his *Ford* claim is ripe. *See Burton v. Stewart*, 549 U.S. 147, 154–55 (2007) (finding capital prisoner's *Ford* claim was "necessarily unripe until the State issued a warrant for his execution"); *see also Holmes v. Neal*, 816 F.3d 949, 954 (7th Cir. 2016) ("Because a *Ford* claim inquires into the prisoner's mental state near the time of execution, a *Ford* claim is typically not ripe until an execution date has been set.").

5. The Nevada lethal injection execution protocol violates Floyd's constitutional rights because the injection of ketamine into Floyd in the amounts called for under the protocol and/or the consumption of chlorpromazine will "prevent[] him from comprehending the reasons for the penalty or its implications." *Ford*, 477 U.S. 417. The operation of Nevada's protocol violates Floyd's Eighth and Fourteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, Floyd requests the following relief:

1. That this Court assume jurisdiction of this cause and set this case for a hearing on the merits.

2. That this Court issue a declaratory judgment declaring and enforcing Floyd's rights under the Eighth Amendment and, further, issue a temporary restraining order or a preliminary or permanent injunction commanding Defendants not to carry out any lethal injection on Floyd until such time as Defendants take the reasonable and necessary steps to devise a new procedure or procedures to carry out a lawful execution and produce a new execution protocol, with reasonable and necessary adjustments made, so that Floyd may be executed in a constitutional manner.

3. That this Court issue a declaratory judgment declaring and enforcing the rights of Floyd, as alleged above, and further issue a temporary restraining order or preliminary or permanent injunction to enforce Floyd's rights under the Sixth, Eighth and Fourteenth Amendments, commanding Defendants to permit Floyd reasonable access to and visits with his counsel during the month preceding the scheduled execution, including continued access to visits with counsel and to the courts on the day of his execution inclusive of the final hours and moments leading up to, and during, the execution.

4. Any other relief that this Court deems appropriate.

/ / /

WHEREFORE, Floyd prays this Court enter an order and judgment as stated above.

DATED this 1st day of July, 2021.

Respectfully submitted
RENE L. VALLADARES
Federal Public Defender

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Timothy R. Payne
TIMOTHY R. PAYNE
Assistant Federal Public Defender

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this complaint are true and correct to the best of counsel's knowledge, information, and belief.

DATED this 1st day of July, 2021.

/s/ David Anthony
DAVID ANTHONY
Assistant Federal Public Defender

/s/ Brad D. Levenson
BRAD D. LEVENSON
Assistant Federal Public Defender

/s/ Timothy R. Payne
TIMOTHY R. PAYNE
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

In accordance with LR IC 4-1(b) of the Local Rules of Practice, the undersigned hereby certifies that on the 1st day of July, 2021, a true and correct copy of the foregoing FLOYD'S AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF DUE TO PROPOSED METHOD OF EXECUTION PURSUANT TO 42 U.S.C. § 1983 was filed electronically with the CM/ECF electronic filing system:

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/s/ Sara Jelinek
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